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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Susan Gellos, individually; Taryn Foster,
 individually,

Plaintiffs

vs.

City of Phoenix, a governmental agency;
 Christopher John Turiano and Jane Doe
 Turiano, husband and wife; William Gates
 and Jane Doe Gates, husband and wife;
 Richard Lee Brunton and Jane Doe
 Brunton, husband and wife; John and Jane
 Does 1-X; ABC Corporations I-X; XYZ
 Partnerships IX,

Defendants.

Case No.: CV-24-01529-PHX-GMS

**PLAINTIFFS' RESPONSE IN
 OPPOSITION TO DEFENDANT
 RICHARD LEE BRUNTON'S
 MOTION TO SET ASIDE CLERK'S
 ENTRY OF DEFAULT**

(Assigned to the Honorable G. Murray
 Snow)

Through undersigned counsel, Plaintiffs Susan Gellos and Taryn Foster (collectively, "Plaintiffs") hereby respond in opposition to Defendant Richard Lee Brunton's Motion to Set Aside Clerk's Entry of Default, ECF No. 12 (the "Motion to Set Aside"), as follows.

Defendant Richard Lee Brunton ("Defendant") was served with the Complaint on May 30, 2024. Phoenix Dfs.' Notice Filing Removal at 40, ECF No. 1. Certain other Defendants removed this action to this Court on June 24, 2024. *Id.* at 1. Defendant had seven (7) days from the filing of the Notice of Removal to answer or otherwise respond to

1 the Complaint, or no later than July 1, 2024. Defendant failed to answer or otherwise
2 respond by that date.

3
4 The very next day – July 2, 2024 – the Court issued an Order to Show Cause, in
5 which it mandated:

6 that Plaintiff show cause no later than **July 10, 2024**, as to why this action
7 should not be dismissed as to Defendant Richard Lee Brunton only for failure
8 to prosecute, unless before then default has been entered or a responsive
pleading has been filed.

9 . . . if Plaintiff fails to comply with this order, the Clerk of Court shall dismiss
10 this action as to Defendant Richard Lee Brunton only on **July 11, 2024**, for
11 Plaintiff's lack of prosecution pursuant to Rule 41(b), Fed. R. Civ. P., and
LRCiv 41.1.

12 Order Show Cause 1:22-2:4, ECF No. 6 (emphasis in original).

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14 Plaintiffs did not immediately apply to default Defendant because, in the week since
15 Defendant's deadline to answer expired, Plaintiffs' counsel was in communication with
16 counsel for Defendant's former employer regarding whether or not said counsel or
17 otherwise would be representing Defendant. Said counsel requested permission to extend
18 Defendant's answer deadline. Plaintiffs' counsel responded that Plaintiffs could not agree
19 to extend the answer deadline unless said counsel first noticed in for Defendant, but that
20 Plaintiffs would wait to file any default until the week of July 8, 2024. As a consequence,
21 Plaintiffs waited until July 9, 2024 to apply for the entry of default of Defendant, the very
22 last day they could do so in order to still show good cause to the Court to not dismiss
23 Defendant, pursuant to the Order to Show Cause. Pls.' Request Entry Default Richard Lee
24 Brunton, ECF No. 7.

1 Defendant requests that the default entered against him by the Clerk of this Court
2 be set aside. “The Federal Rules provide that a ‘court may set aside an entry of default for
3 good cause’” *U.S. v. Signed Personal Check No. 730*, 615 F.3d 1085, 1091 (9th Cir.
4 2010) (quoting Fed. R. Civ. P. 55(c)). “To determine ‘good cause’, a court must ‘consider[]
5 three factors: (1) whether [the party seeking to set aside the default] engaged in culpable
6 conduct that led to the default; (2) whether [it] had [no] meritorious defense; or (3) whether
7 reopening the default judgment would prejudice’ the other party.” *Id.* (quoting *Franchise*
8 *Holding II v. Huntington Rests. Group, Inc.*, 375 F.3d 922, 925-26 (9th Cir. 2004)). “[A]
9 finding that **any one** of these factors is true is sufficient reason for the district court to
10 refuse to set aside the default.” *Id.* (emphasis added) (citing *Franchise Holding II*, 375
11 F.3d at 925-26).

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15 With regard to factor (1), a failure to answer a complaint is “culpable conduct”
16 where the defendant “acted with bad faith such as an ‘intention to take advantage of the
17 opposing party, interfere with judicial decision making, or otherwise manipulate the legal
18 process.’” *See id.* at 1092 (quoting *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691,
19 697 (9th Cir. 2001)). Defendant claims he did not act in bad faith. Mot. Set Aside 3:21.
20 Here, there is evidence showing bad faith.
21

22 For example, Defendant appears to be less than truthful in his supporting
23 Declaration. He claims therein that after being served with process he “did not know when
24 a response to the Complaint was due” Decl. Df. in Support Mot. Set Aside ¶ 4. This
25 is simply not credible, because the Summons he was served with states in capital letters on
26 page one (1) that an “Answer must be filed within TWENTY (20) CALENDAR DAYS
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1 from the date of service, not counting the day of service.” State Court Summons to
2 Defendant attached as “**Exhibit 1**” hereto, at 1 (capitals in original). This calls into
3 question Defendant’s honesty in the execution of his Declaration, and further calls for a
4 presumption of bad faith in his conduct at issue.
5

6 Because there is evidence of his bad faith, Defendant therefore engaged in culpable
7 conduct that led to his default, and thus this Court is fully justified in refusing to set that
8 default aside. *See Signed Personal Check No. 730*, 615 F.3d at 1091-92.
9

10
11 **RESPECTFULLY SUBMITTED** this 5th day of August 2024.

12 **MILLS + WOODS LAW, PLLC**

13
14 By /s/ Sean A. Woods
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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2024, I electronically transmitted the foregoing document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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